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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-635

ROBERT T. STEAD, Petitioner,
v.
SECURITIES AND EXCHANGE COMMISSION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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November 8, 1971

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No._____

ROBERT T. STEAD, Petitioner
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent

Petition for a Writ of Certiorari to The
United States Court of Appeals for the
Tenth Circuit

The Petitioner, Robert T. Stead, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 2, 1971.

OPINION BELOW

The opinion of the Court of Appeals is reported in 444 F.2d 713 (10th Cir. 1971) and appears in the Appendix hereto. The matter, originally before the Securities and Exchange Commission ("Commission") was reported as Securities Exchange Act Release No. 8905 (June 19, 1970), and is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 2, 1971. A petition for rehearing was timely filed and denied on August 16, 1971, and this petition for ceriorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Securities and Exchange Commission denied petitioner due process of law under the Fifth Amendment to the United States Constitution when it considered information outside the record and relied upon such information, as a basis for sanctions against Petitioner Stead, without notice to the

Petitioner, and without affording an opportunity to rebut or respond?

2. Whether the Securities and Exchange Commission denied petitioner due process of law under the Fifth Amendment to the United States Constitution when it violated its own rules of practice to the detriment of the Petitioner, 17 C.F.R. § 201.14(d), by considering information outside the record and by relying upon such information as a basis for imposing sanctions against Petitioner without giving Petitioner notice or an opportunity to rebut or respond?

3. Whether the Securities and Exchange Commission violated the Administrative Procedure Act, 5 U.S.C. § 556(e), by basing its decision on material exclusive of the evidence presented to the Commission or its hearing examiner without affording Petitioner an opportunity to show to the contrary?

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Code, Title 5:

§ 556(e). The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

Code of Federal Regulations, Title 17:

§ 201.14(d). *Official Notice.* In any proceeding official notice may be taken of any material fact which might be judicially noticed by a district court of the United States, any matter in the public official records of the Commission, or any matter which is peculiarly within the knowledge of the Commission as an expert body. If official notice is requested or taken of a material fact not appearing in the evidence in the record, the parties, upon timely request, shall be afforded an opportunity to establish the contrary.

STATEMENT OF THE CASE

The Petitioner, Mr. Robert T. Stead, was an employee of

Babcock & Co., a securities broker-dealer in Salt Lake City, Utah. Mr. Stead, along with others, was charged by the Division of Trading and Markets of the Securities and Exchange Commission with violations of Sections 5(a) and 5(c), of the Securities Act of 1933, 15 U.S.C. § 77e, and with violations of Section 15(c)(1) and Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78o(c)(1), 78q(a).

An adversary administrative disciplinary hearing was held before a hearing examiner from 21 to 27 May, 1968. The examiner's findings were that Petitioner had violated specific provisions of the cited acts. Upon review by the Securities and Exchange Commission the findings were modified, some violations dismissed but others sustained. The Commission imposed a sanction barring Mr. Stead from being associated with any broker or dealer, except that after three months, he could become associated with a broker-dealer in a supervised capacity upon an appropriate showing that he will be adequately supervised. In reaching its decision the Securities and Exchange Commission observed:

> Stead urges that no sanction be imposed upon him. As we have seen, Stead's participation in the violations found, except for those relating to the distribution of Triumph stock, was more limited than Babcock's, and we have exonerated him from responsibility in connection with registrant's inaccurate financial report and Regulation T violations. He states that, unlike Babcock, he did not occupy a managerial position with registrant and had received no prior warnings of misconduct, that he has been in the securities business for 15 years without any other complaint, and that he is now the owner and principal of a broker-dealer firm employing about 20 persons and the sanction ordered by the examiner would close that business. *We note, however, that Stead, as well as registrant and Babcock, was named as a respondent in the broker-dealer proceedings instituted in 1969, and that those proceedings are pending against him.* Securities Act Release No. 8905 (June 19, 1970) [A. 11] [1]

The existence of a pending order for proceedings, i.e. addi-

[1] This designation is used throughout to refer to the Appendix, which is bound herewith following this petition.

tional pending administrative proceedings totally unrelated to the case being adjudicated, was not introduced before the hearing examiner. The Commission clearly relied upon this unrelated charge not yet adjudicated in determining the severity of the sanction that was imposed. On July 7, 1970 the Petitioner filed a petition for rehearing with a request for oral argument. Petitioner Stead objected to the Commission's consideration of the extra-record information concerning which no findings have been made and which merely constituted an as yet unadjudicated accusation. The Petition for rehearing was denied [A. 15]. In its order denying rehearing the Commission again observed, "In determining that it was appropriate to impose the sanctions in question . . . :"

> Moreover, as we previously noted in rejecting the assertion that he [Stead] was not the subject of any other complaint, petitioner [Stead] was named as a respondent in broker-dealer proceedings instituted in April, 1969. Those proceedings charge willful violation of the registration provisions of the Securities Act from January to August 1968. [A. 16]

Thus it is clear that the Commission relied upon a collateral charge upon which no hearing had been had or findings made without affording Petitioner Stead in the pending proceeding an opportunity to rebut or explain the wholly unrelated accusation, and based its sanction at least in part upon unresolved charges.

A petition for review of the Commission's decision was made to the United States Court of Appeals for the Tenth Circuit. Petitioner Stead raised as a point on appeal the following issue:

> The Commission Violated Its Own Rules of Practice, The Administrative Procedure Act, and the Due Process Clause of the United States Constitution by Basing Its Sanction In Part Upon Matters Not in the Record.

The Court of Appeals affirmed the Commission's order, 444 F.2d 713 (10th Cir. 1971) [A. 18]. It did not treat in its opinion, however, the issue of whether the Commission proceeded improperly in basing its sanction in part on matters not in the record, i.e. the collateral charge concerning which Petitioner Stead had no opportunity to respond.

Petitioner Stead applied for rehearing urging as one issue:

The Court Failed to Respond to the Petitioner's Contention That the Due Process Clause of the United States Constitution, the Commission's Rules and Regulations, and the Administrative Procedure Act Were Violated By the Commission in its Decision.

The petition for rehearing was denied without opinion on August 16, 1971.

REASONS FOR GRANTING THE WRIT

1. THE SECURITIES AND EXCHANGE COMMISSION DENIED PETITONER DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT CONSIDERED INFORMATION OUTSIDE THE RECORD WITHOUT AFFORDING PETITIONER STEAD AN OPPORTUNITY TO REBUT OR RESPOND AND WHEN IT RELIED UPON SUCH INFORMATION AS A BASIS FOR IMPOSING SANCTIONS AGAINST PETITIONER.

The Court of Appeals observed as to the sanction imposed:

> The Commission barred Stead from being associated with any broker or dealer for three months. After that time he can be so associated but only in a supervised capacity and upon an appropriate showing that he will be adequately supervised. Stead contends that the effect of this sanction is to put him out of the securities business, especially since he is now managing his own brokerage firm which he opened after the instant proceedings had begun. While we appreciate the impact of the sanction imposed by the commission, we are also mindful of the fact that the commission and not the Court has been assigned primary responsibility by Congress for the protection of investors in securities. 444 F.2d at 717 [A. 22]

Thus, the Court of Appeals acknowledged that the Commission's order would put Mr. Stead out of business, thereby destroying his livelihood. The sanction imposed by the Commission would require that Stead disband his own brokerage firm and divest himself of his property interest therein. The Court tacitly approved such a result even though the Securities and Exchange Commission's decision was based in part on evidence

sans the record which Mr. Stead was not allowed to explain or rebut. Such action denied Petitioner due process of law contrary to the Fifth Amendment to the Constitution of the United States. Petitioner Stead should have been afforded a right to respond to the unrelated collateral charges which the Commission accepted without challenge as a basis of imposing its sanction. This Court has heretofore ruled that where administrative agencies use extra-record information under circumstances where a party is denied an opportunity to rebut or explain, there is a denial of due process of law. In *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292 (1937), this Court held that extra-record information as to the adjusted value of public utility property in effect denied due process of law. In the instant case, the Securities and Exchange Commission was not fashioning a broad remedy of general application for the securities industry as a whole, but was adjudicating a particular disciplinary sanction as to one individual, and was taking notice not of a general fact of common knowledge to all judges, but of a particular sanction to one individual and was taking notice not of a general fact of common knowledge to all judges, but of a particular fact as it pertained to a specific individual – Petitioner Stead. Under these circumstances, Petitioner Stead obviously had a special and personal interest in the ruling of the Commission, and due process should have afforded him an opportunity to submit evidence to the Commission or rebut or explain the extra-record evidence before it was utilized as a basis for imposing a sanction. As Professor Davis observes in his treatise on *Administrative Law*, Volume 2, Sec. 1502, a party in the circumstances of Petitioner Stead should be given an opportunity to explain or rebut evidence similar to that considered by the Commission in the instant case:

> When the extra-record facts are of a general character and do not peculiarly involve a particular party, cutting off a chance to rebut or explain may often be fair, because the tribunal itself may be in a better position than the party to make a full and adequate investigation. But when the extra-record facts do peculiarly relate to the particular party, a determination which fails to take into account any explanation or rebuttal he may make is very likely to be fundamentally unfair.

Other decisions have been sensitive to the due process problem inherent in the action taken in the instant case and have found

such consideration of extra-record facts to be fundamentally unfair. *West Ohio Gas Company v. Public Utilities Commission,* 294 U.S. 63 (1935). *cf. Soana v. Celebrezze,* 234 F. Supp. 299 (E.D. Pa. 1964). Such unfairness is highlighted by the fact that administrative disciplinary sanctions, such as that imposed by the Commission against Petitioner, have been held to be penal or quasi-criminal in nature rather than remedial. See *Beck v. Securities and Exchange Commission,* 430 F.2d 673 (6th Cir. 1970).

In *California Department of Human Resources Development v. Java,* 39 U.S.L.W. 4491 (1971), this Court construed Section 303(a)(1) of the Social Security Act of 1935, as amended, 42 U.S.C. 503(a)(1), as prohibiting withholding of unemployment compensation until a hearing and notice and *an opportunity to present respective positions had been afforded.* The necessity of an opportunity of presenting evidence or explaining conduct prior to terminating an important license was also recently recognized when this Court invalidated Georgia's Motor Vehicle Responsiblity Statute. The Act provided for suspension of an uninsured motorist's car registration and driver's license without a hearing on potential liability. *Bell v. Verson,* 39 U.S.L.W. 4607 (1971).

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), this Court ruled that Aid to Families with Dependent Children (AFDC) benefits should not be terminated without affording recipients an opportunity for oral presentation of evidence rebutting all charges and that welfare recipients must "be given an opportunity to confront and cross-examiner the witnesses relied upon by the Department." 397 U.S. at 270. Additionally, in *Snidach v. Family Finance Corporation of Bayview,* 395 U.S. 337 (1969), this Court ruled that before wages were subject to garnishment there should be an opportunity for the garnishee to be heard. The position of Petitioner Stead in the instant case is equally as precarious as the wage earner facing garnishment, the welfare recipient facing termination of benefits, and indeed of greater gravity than a person about to lose his driving privileges. As the Court of Appeals for the Tenth Circuit observed in this case, the effect of the Securities and Exchange Commission's ruling is to place Petitioner Stead out of business, i.e. to cause him to forfeit a business that he has presently developed and all of its accoutrements and benefits. 444 F.2d at 717 [A. 22]. Not only does he lose the assets of a business but his livelihood is ended.

Under these circumstances, the fundamental fairness assured by the due process clause of the United States Constitution requires that Stead should be afforded an opportunity to respond to the extra-record evidence of unrelated charges which the Securities and Exchange Commission relied upon as a basis for imposing the penal, quasi-criminal sanctions against Petitioner.

2. THE SECURITIES AND EXCHANGE COMMISSION DENIED PETITIONER DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN IT VIOLATED ITS OWN RULES OF PRACTICE BY CONSIDERING INFORMATION OUTSIDE THE RECORD WITHOUT AFFORDING AN OPPORTUNITY TO REBUT OR RESPOND WHEN IT WAS RELYING UPON SUCH INFORMATION AS A BASIS FOR IMPOSING SANCTIONS AGAINST PETITIONER.

The Commission's Rules of Practice, 17 C.F.R. § 201.14(d), allows the Securities and Exchange Commission to take "official notice" of a material fact that might be judicially noticed by the District Court of the United States or any matter in the public official records of the Commission as an expert body. If such notice is taken of such a material fact *not* a part of the record, however, upon timely request of the parties an opportunity to rebut must be afforded. In the instant case Petitioner Stead first had notice of the extra-record evidence by the Commission after it rendered its decision. Mr. Stead then objected at the earliest possible moment, when he filed his petition for rehearing. The objection was preserved in Petitioner Stead's position for review and his petition for rehearing to the Court of Appeals for the Tenth Circuit. It is submitted that the failure of the Commission to compy with its own regulations cited above effectively denied petitioner due process of law. This Court has heretofore noted that agencies must comply with their own rules and regulations as it obviously affords a person no benefit to have notice of a rule only to have it ignored by the very agency which adopted it, *Greene v. McElroy*, 360 U.S. 474 (1959); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); and it is sufficient if an agency is on reasonable notice of the party's desire to claim the benefits of a regulation. *Yellin v. United States*, 374 U.S. 114 (1962). This last requirement was certainly met by Petitioner Stead in this case where he specifically cited it as one of the grounds for rehearing of the Commission's order. Al-

though these cases did not directly conclude that due process was denied by an agency ignoring its own rules, the requirement that an agency comply with its own regulations was clearly ordered lest due process problems encountered. *Yellin v. United States, supra.* In this case, there was no compliance with the letter, much less the spirit, of the applicable rule of the Securities and Exchange Commission. Consequently, a determination crucial and prejudicial to Mr. Stead was made without an opportunity to rebut damaging evidence of unrelated charges. It is submitted that under these circumstances the failure of the Securities and Exchange Commission to comply with the agency's own regulations was tantamount to a denial of due process of law.

3. THE SECURITIES AND EXCHANGE COMMISSION VIOLATED THE ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. § 556(e), TO THE PREJUDICE OF PETITIONER STEAD, BY BASING ITS DECISION ON MATERIAL EXCLUSIVE OF THE EVIDENCE PRESENTED TO THE COMMISSION WITHOUT AFFORDING PETITIONER AN OPPORTUNITY TO DEMONSTRATE TO THE CONTRARY.

The Administrative Procedure Act, 5 U.S.C. § 556(e), provides that the testimony and exhibits together with all papers and requests before an agency shall constitute the exclusive record. The provision also indicates that when a decision rests upon official notice of a material fact not appearing in the record a party is entitled on timely request to an opportunity to show to the contrary. The Securities and Exchange Commission has itself noted that it may not take official notice of facts in other proceedings respecting others which the present party has not had an opportunity to controvert or refute. *Wanda L. Olds,* 6 Pike and Fisher, *Administrative Law* 2d, 43 (S.E.C. 1956). Obviously the intention of Congress was to impose a limitation on an agency taking official notice of its own records where a charged party has no opportunity to rebut any adverse effect from the evidence. Under the circumstances that prevailed in the instant case Petitioner Stead was patently denied an opportunity to rebut the evidence of an unrelated charge, concerning which the Commission took notice and utilized as a basis in determining the severity of a penal, quasi-criminal sanction that was thereafter imposed against him. Such procedure is clearly

contrary to the cited federal statute. Since the Commission's unfair action severely prejudiced Petitioner, such error is not harmless, and should not be overlooked. Such improper agency action, if left uncorrected, will destroy Mr. Stead's means of livelihood, and severely damage his professional broker-dealer career and his business property rights.

4. THE EFFECT OF THE GENERAL APPLICATION OF THE PROCEDURE WHICH HAS BEEN UTILIZED BY THE COMMISSION IN THIS MATTER WOULD BE TO EFFECTIVELY DENY DUE PROCESS OF LAW AND THE PROTECTION OF THE ADMINISTRATIVE PROCEDURE ACT TO THE MANY PRIVATE PERSONS WHO COME BEFORE THE COMMISSION AND OTHER AGENCIES IN ADMINISTRATIVE PROCEEDINGS, AND WOULD RENDER MEANINGLESS THE PROTECTIVE PROVISIONS OF SUCH AGENCY RULES OR PRACTICE AS HAVE BEEN PROMULGATED BY THE COMMISSION AND WHICH ARE CITED HEREIN.

If federal agencies are able to draw from unresolved and totally unrelated charges the basis for the quasi-criminal, penal sanctions they mete out, as the Commission has done in this case, the private litigant would be effectively denied the protection of due process, the Administrative Procedure Act, and special agency rules of practice with regard to notice and an opportunity for hearing. The matter is extremely important for all private litigants in controversies with federal agencies as illustrated here in the context of the Commission's action where the litigant's license to do business is at stake. If an agency is allowed to proceed in this "bootstrap" fashion, the private citizen will be effectively stripped of his ability to defend himself against agency charges.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

Dated this 8th day of November, 1971.

Respectfully submitted,

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(Securities Exchange Act Release No. 8905)

ADMINISTRATIVE PROCEEDING
FILE NO. 3-1512

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C.
June 19, 1970

In the Matters of

BABCOCK & CO.
136 South Main Street
Salt Lake City, Utah

(8-11902)

LOUIS W. BABCOCK
ROBERT T. STEAD

FINDINGS
AND
OPINION
OF THE
COMMISSION

Securities Exchange Act of 1934 –
Sections 15(b) and 15A

BROKER-DEALER PROCEEDINGS

Following hearings in these proceedings pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act"), the hearing examiner issued an initial decision in which he concluded that the registration as a broker and dealer of Babcock & Co. ("registrant"), a partnership, should be revoked and that it should be expelled from membership in the National Association of Securities Dealers, Inc. He further concluded that Louis W. Babcock, registrant's only active partner, and Robert T. Stead, a salesman and trader for registrant, should be barred from association with any broker or dealer, with the proviso that after six months each of them may become associated with broker-dealer in a supervised capacity upon a showing that he will be adequately supervised. We granted the petitions of registrant, Babcock and Stead for review of the initial decision. Respondents and our Division of Trading and Markets ("Division") filed briefs, and we heard oral argument. Our findings are based upon an independent review of the record.

Registrant became registered with us in April 1964. Regis-

trant's principal office was in Ogden, Utah, and Stead was employed in its only branch office, which was located in Salt Lake City and accounted for about 80% of registrant's business.

Transactions in Unregistered Securities

The record establishes that from about April 20 to June 1967, respondents willfully violated the registration provisions of Sections 5(a) and 5(c) of the Securities Act of 1933 in the offer, sale and delivery of the common stock of Triumph Corporation, and that during August and September 1967 registrant willfully violated those provisions in the offer, sale and delivery of the stock of Silver Shield Corporation.

Registrant offered and sold Triumph stock on behalf of the issuer when no registration statement under the Securities Act had been filed or was in effect as to such stock. Sales of the stock were effected by Babcock through an account in registrant's principal office in Triumph's name, and by Stead through an account in the branch office entitled "R & E Investment" which replaced the Triumph account and was opened on April 20, 1967.[1] Both accounts were opened by Hugo Emery who, as Babcock and Stead knew, was president of Triumph, and the only transactions in those accounts were sales of Triumph stock. The R & E account contained Triumph stock that was borrowed by the company and was to be sold to raise funds for its drilling program.[2] Registrant purchased for its trading account a total of 17,000 shares of Triumph stock from the Triumph account on March 22 and April 19, 1967, and thereafter sold a number of such shares, and, in addition, it sold around 70,000 shares of Triumph stock in the R & E account between April 20 and May 1, 1967.

Stead claims that he was not involved in the transactions in the R & E account that were effected prior to April 28 because he assertedly did not commence his employment with registrant

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[1]Babcock testified that the earlier account was mistakenly opened in the name of Triumph instead of R & E.

[2]The stockholders who loaned the shares to Triumph had the option of accepting a certain payment for or the return of such shares.

until April 27.[3] While there is some uncertainty in the record as to the exact date of the beginning of Stead's employment, taken as a whole the evidence supports the examiner's finding that such date was around April 20. The first transaction in the R & E account with registrant which Stead handled as a salesman was effected on that date, and the record indicates that the account was opened by Stead. Moreover, on that date the last sale of Triumph stock was effected in a similar account maintained with Stead's previous employer which had also been opened by Emery for the purpose of selling such stock and was handled by Stead, and also on that date Stead effected the first transaction in his personal trading account with registrant. It further appears that Stead ceased trading in his personal account with his prior employer on April 21. Stead additionally participated in the distribution of Triumph stock in that from April 24 to May 1, 1967 he purchased 20,000 Triumph shares from the R & E account for his own trading account with registrant and resold virtually all of such shares during that period.

Respondents assert that reasonable inquiry concerning the status of Triumph stock had been made by Stead when he handled the R & E account for his previous employer. Stead testified that he had questioned Emery who stated that he did not own that stock, that it was not control stock, and that he was acting as agent for certain stockholders who did not want their identities disclosed. Stead also testified that he communicated with the transfer agent who stated the stock was freely tradeable. Stead further testified that he was not aware that the transfer agent was also an officer of Triumph. Registrant and Babcock also assert that a subsequent inquiry of the transfer agent was made by Stead at the instance of registrant after Stead became employed by registrant, and that such inquiry confirmed the free trading status of the stock.

In our opinion, respondents could not properly rely on the statements made to Stead by Emery and the transfer agent regarding the status of the Triumph stock in the R & E account maintained with Stead's previous employer, particularly since

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[3]Stead's answer originally recited that his employment began about April 15, and was amended at the hearing to state April 23.

Emery had refused to disclose the identity of the persons for whom he was purportedly acting as agent and had previously demonstrated to registrant and Stead his strong interest in selling Triumph shares.[4] That further investigation was necessary is evidenced by the transfer agent's testimony that had Stead asked her to identify the beneficiary of the R & E account, she would have named Triumph.[5] The subsequent inquiry by Stead while employed by registrant was made long after the sales in question and after our staff had inquired into the propriety of registrant's transactions in Triumph stock. We conclude that Babcock and Stead failed to make sufficient inquiry despite the various circumstances which should have alerted them to the need for such inquiry.[6]

Registrant effected transactions in Silver Shield stock in an account maintained in registrant's branch office in the name of "J. J. Minerich & Co." The account was opened by William Campbell, Jr., who was president of Silver Shield as well as president of Minerich, for the purpose of selling Silver Shield stock as to which no registration statement under the Securities

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[4]Pursuant to an option granted by Emery in March 1967, registrant's purchases of 17,000 shares from the Triumph account on March 22 and April 19, 1967 were effected at 10 cents per share, when the market price was considerably higher as evidenced by substantially contemporaneous prices of 14 cents and 17-½ cents at which registrant purchased or sold such shares. We find, as did the examiner, that this option was given to registrant as a special inducement to sell Triumph stock. We further note that, in the course of Stead's previous employment, Emery had offered compensation for inserting quotations for Triumph stock in the sheet, although such offer was declined by Stead.

[5]Stead refers to testimony of the transfer agent indicating that she had had a legal opinion that the Triumph stock "involved" was freely tradeable. However, that opinion, which apparently was oral, did not relate specifically to the stock in the R & E account.

[6]See *Strathmore Securities, Inc.*, Securities Exchange Act Release No. 8207, p. 10 (December 13, 1967), *aff'd* 407 F.2d 722 (C.A. D.C. 1969); *S.E.C.* v. *Culpepper*, 270 F.2d 241, 251 (C.A. 2, 1959); *S.E.C.* v. *Mono-Kearsarge Consolidated Mining Company*, 167 F. Supp. 248, 259 (D. Utah, 1958).

Act had been filed or was in effect. The only transactions in the account were sales of Silver Shield stock at Campbell's direction, and 125,000 shares were sold from August 21 to September 4, 1967. Those shares were subject to registration because Campbell controlled both the issuer and Minerich and the latter was therefore an "issuer" and registrant an underwriter within the meaning of Section 2(11) of the Securities Act. In addition, at least a portion of those shares had been acquired by Minerich from the issuer around the time of the sales and registration of such shares was required because Minerich and registrant were statutory underwriters. Checks for the proceeds of the sales, which were prepared by registrant's principal office, were sent to Minerich at the same address Campbell had as a customer of registrant and were endorsed by Campbell as its president.[7]

The salesman who handled the account testified that, pursuant to his inquiry in connection with opening the account, he was advised by Campbell that the stock was not insider or control stock. We agree with the examiner that the salesman failed to make adequate inquiry with respect to the tradeability of the stock. The salesman knew that Campbell was president of Silver Shield but did not inquire as to the nature of Campbell's relationship with Minerich, whose account was opened by Campbell, with a view to determining whether Minerich and Silver Shield were subject to his common control.

As further found by the examiner, registrant, while participating in the distribution of Triumph stock, effected transactions in the stock without giving to purchasers at or before the completion of each purchase written notification of the existence of its participation in the distribution in willful violation of Section 15(c)(1) of the Exchange Act and Rule 15c1-6 thereunder. We also find, as did the examiner, that Babcock and Stead willfully aided and abetted registrant's violations of those provisions.

Failure to Comply with Record-Keeping Requirements

The record supports the examiner's finding that registrant, willfully aided and abetted by Babcock, willfully violated the

[7]The same salesman also opened and handled Campbell's personal account.

record-keeping provisions of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, in failing to make and keep current and accurate certain required books and records.

An inspection by our staff in late September and early October 1967 disclosed that registrant failed to maintain a commission payable account and a record of monies borrowed and loaned and securities pledged, that the general ledger had not been posted since May 31, 1967, and that current trial balances had not been prepared for June, July or August 1967. Belated trial balances for those months prepared at the request of our staff were deficient in failing to indicate, among other things, securities pledged, monies borrowed, and sales commission payable. And the brokers' and customers' accounts showed only net figures instead of separate aggregate debit and credit balances. In addition, registrant's stock position records were not current or accurate.

The condition of registrant's records was such that registrant's chief cashier had characterized them as being in a state of "turmoil" and registrant ceased doing business from October 6 to December 29, among other things, to reconstruct the books and records and install a new bookkeeping system.

We further find, as did the examiner, that Stead willfully aided and abetted registrant's bookkeeping violations to the extent that they involved deficiencies in his individual trading account with respect to matters that were subject to his control. Stead's account was rendered inaccurate by virtue of, among other things, the arrangements involving the delivery of his own securities to registrant for the purpose of future sale. As Babcock advised Stead, such securities were not entered in Stead's account. Babcock did not wish to have those securities reflected on registrant's books because of the additional work and expense that would be involved in connection with an impending audit of registrant's books and because he considered many of them to be of poor quality. Following the sale by Stead of such securities, Babcock in some instances entered them in the Stead account for the first time. In other instances no entry was made to reflect receipt of a security whose sale was recorded, thereby giving the misleading appearance of a short sale. A reconstructed account subsequently prepared by registrant's chief cashier also showed substantial differences in money balances and se-

curities received, with the disparity in money balances amounting to $23,875 as of May 31, 1967.

Registrant and Babcock urge that any violations were not willful, and that the problems in this respect resulted from an increase in business and the difficulty of obtaining and retaining competent help and were similar to those experienced by other firms. It is well established, however, that a finding of willfulness does not require an intent to violate the law; it is sufficient that the person charged with the duty intentionally commits the act which constitutes the violation.[8] Although registrant and Babcock were warned by our staff in 1965 and 1966 of record-keeping deficiencies and registrant was unable to maintain its records on a current basis, Babcock engaged Stead in April 1967 to increase business volume, and following his employment, registrant's volume increased 60%. Although it appears that registrant contracted to purchase a bookkeeping machine prior to Stead's employement, there was a delay in its arrival and programming, and it kept breaking down.

Stead points out that, as found by the examiner, he was not employed in a managerial capacity, and argues that he is not responsible for registrant's record-keeping deficiencies with respect to his own account which was kept in the principal office and supervised by Babcock. As previously indicated, however, we have limited his culpability to the deficiencies found in his own account of which he knew or should have known because they involved matters subject to his control.

Inaccurate Financial Report

Registrant's report of financial condition as of May 31, 1967, which was signed and sworn to by Babcock and was filed with us in July 1967, contained materially inaccurate statements. That report showed a net worth of $53,880 and current liabilities of $185,099, including commissions payable of $3,024. Liabilities were understated by at least $9,152, representing commissions and other moneys payable to Stead.[9] In addition, the

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[8]See *Tager* v. *S.E.C.*, 344 F.2d 5, 8 (C.A. 2, 1965), and cases there cited.

[9]The figure of $9,152 is based on corrections made to the financial report submitted by registrant's auditors in (cont.)

report referred to the existence of an "automatic" bank loan of up to $25,000 in the event of an overdraft position when, in fact, no such loan existed.

We agree with the examiner that in the above manner registrant, willfully aided and abetted by Babcock, willfully violated the reporting provisions of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder. Although Babcock asserts that he signed the report in reliance upon the certified public accountant who prepared it, it is clear that he had the primary responsibility for the accuracy of the information to which he swore and that he cannot shift such responsibility to the accountant.[10]

Improper Extension of Credit

Registrant and Babcock do not dispute the hearing examiner's conclusion, and we find, that between April 1967 and January 1968 registrant violated the credit provisions of Section 7(c) of the Exchange Act and Sections 4(c)(2) and 4(c)(8) of Regulation T promulgated thereunder by the Board of Governors of the Federal Reserve System. We further conclude, as did the examiner, that such violations were willful. As found by the examiner, registrant in a number of instances failed promptly to cancel or liquidate purchases by customers in cash accounts handled by a salesman in registrant's branch office in which full payment was not made within seven business days. Registrant also permitted customers to purchase securities in cash accounts which did not contain sufficient funds for such purchases prior to execution and in which during the preceding 90 days securities were purchased and, without full payment being made,

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(9 cont.) January 1968. An earlier reconstructed version of Stead's account prepared in November 1967 by registrant's cashier showed an understatement of $23,875 in moneys payable to Stead, but it is not clear whether the auditors took the changes reflected in the cashier's version into account.

[10]See *Thompson & Sloan, Inc.*, 40 S.E.C. 451, 456 (1961); *Interstate Hosiery Mills, Inc.*, 4 S.E.C. 706, 721 (1939). The examiner also found that Stead willfully aided and abetted registrant's violation of the reporting provisions. The record before us, however, does not contain sufficient evidence to support this finding.

were sold.[11]

These respondents assert that registrant was denied adequate time to prepare a defense by virtue of an amendment to the charge of Regulation T violations in the order for proceedings requested by the Division and granted by the hearing examiner in the course of the hearings. The amendment changed the allegation charging a violation of Section 4(c)(5), which requires payment within 35 days against delivery, to one charging a violation of Section 4(c)(2), which requires payment within seven business days. In our opinion no prejudice has been shown. Registrant had adequate time to prepare a defense to the amended charge, and additional time was not requested by it. In any event, the charge as amended was based upon registrant's own records, and not upon unexpected evidence.

Other Matters

Respondents assert that the hearing examiner's treatment of certain charges as to which he determined not to find a violation or, in one instance where he found a violation, not to consider it in imposing a sanction, prejudicially influenced his evaluation of the sanctions to be imposed,[12] and evidenced bias against them. There is no substance to this assertion. In our opinion, it was appropriate for the examiner, in considering the Division's contentions with respect to those charges, to discuss them fully and explain his reasons for rejecting them so that the Division could determine whether to seek review of his findings. We consider that the examiner who is legally trained and judicially oriented, would not be prejudicially influenced by those

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[11] In our opinion the record does not support the hearing examiner's further finding that Babcock and Stead aided and abetted the violations of Regulation T. Moreover, Babcock was not charged with a failure of adequate supervision.

[12] The examiner held that the conduct involved in one of the charges did not constitute a violation of the designated statutory provision; refused to sustain another charge on the ground that the conduct in question was not willful; held that a third charge was not sustained by a preponderance of the evidence; and determined not to base any sanctions upon a fourth charge, as to which he found a violation, because he was unable to find any precedent for such a finding.

findings. Moreover, our determination of the question whether the sanctions ordered by the examiner should be set aside or reduced is based on our independent examination of the record with respect to the issues raised by respondents' petitions for review.

Public Interest

Registrant and Babcock contend that the sanctions imposed upon them by the examiner are unduly severe and not comparable to those imposed in analogous cases. They assert among other things that customers have suffered no losses, and that registrant "voluntarily" suspended business for almost three months to make its books and records current and accurate and has maintained proper records since, has closed its Ogden office and no longer employs Stead, has prohibited its traders from maintaining personal accounts with it, and has retained a new accounting firm and legal counsel to insure future compliance with applicable requirements. Finally, they state that our staff has lodged no complaints against them since the hearings which were held in May 1968, and that barring Babcock from all but supervised association (after six months) will remove him permanently from any meaningful participation in the securities business and is penal in nature.

In our opinion, the factors presented by registrant and Babcock and the fact that we have made no adverse finding against Babcock as to the Regulation T charge are not sufficient to warrant a reduction in the sanctions imposed upon them by the examiner. The violations we have found here demonstrate either an inability or unwillingness to operate registrant's business in conformity with applicable requirements, even after these respondents were alerted to certain of those requirements by our staff. It is mere speculation to affirm that no customer suffered a loss where securities are distributed without the safeguards provided by full disclosure of pertinent information, and where records are not properly kept. The suspension of registrant's operations to correct its records was pursuant to Babcock's understanding from conversations with our staff that otherwise steps would be taken to close the business. With respect to the asserted absence of any staff complaint against these respondents since the hearings, we note that in April 1969 (prior to their assertion), upon the recommendation of our staff, we in-

stituted broker-dealer proceedings against them charging willful violation of the registration provisions of the Securities Act in 1968.[13]

The remedial action which is appropriate in the public interest with respect to any particular respondent depends on the applicable facts and circumstances and cannot be measured precisely on the basis of the action taken against other respondents.[14] The sanctions imposed are remedial, not penal, in nature and are designed to protect investors and the public interest by barring registrant from the securities business and deterring Babcock as well as others in the industry from committing violations of the securities laws. The requirement of supervised assocation in any future employment will not necessarily be permanent. A future employer would not be precluded from making a showing in favor of permitting Babcock to occupy a supervisory position.[15]

Stead urges that no sanction be imposed upon him. As we have seen, Stead's participation in the violations found, except for those relating to the distribution of Triumph stock, was more limited than Babcock's, and we have exonerated him from responsibility in connection with registrant's inaccurate financial report and Regulation T violations. He states that, unlike Babcock, he did not occupy a managerial position with registrant and had received no prior warnings of misconduct, that he

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[13]Pursuant to an offer of settlement in those proceedings submitted by registrant and Babcock without admitting or denying the allegations, those respondents were found, among other things, to have willfully violated the registration provisions as alleged, registrant's broker-dealer registration was suspended for 30 days, and Babcock was suspended from association with any broker-dealer for a like period. Securities Exchange Act Release No. 8804 (January 21, 1970).

[14]See *Dlugash* v. *S.E.C.*, 373 F.2d 107, 110 (C.A. 2, 1967); *Century Securities Company*, Securities Exchange Act Release No. 8 3, p. 12 (July 14, 1967), *aff'd sub nom. Nees* v. *S.E.C.*, 414 F.2d 211 (C.A. 9, 1969).

[15]See *Melvyn Hiller*, Securities Exchange Act Release No. 8476, p. 6 (December 24, 1968), *aff'd sub nom. Gross* v. *S.E.C.*, 418 F.2d 103 (C.A. 2, 1969).

has been in the securities business for 15 years without any other complaint, and that he is now the owner and principal of a broker-dealer firm employing about 20 persons and the sanction ordered by the examiner would close that business. We note, however, that Stead, as well as registrant and Babcock, was named as a respondent in the broker-dealer proceedings instituted in 1969, and that those proceedings are pending against him. Under all the circumstances, while Stead has not made a sufficient showing to warrant setting aside the sanction imposed by the examiner, we consider that it would be appropriate to reduce such sanction by changing the proviso to the bar order so that Stead may become employed in a supervised capacity after three months, upon a showing of adequate supervision.

An appropriate order will issue.[16]

By the Commission (Chairman BUDGE and Commissioners OWENS, SMITH and NEEDHAM), Commissioner HERLONG not participating.

/s/ Orval L. DuBois
Secretary

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[16]The exceptions to the initial decision of the hearing examiner are overruled or sustained to the extent they are inconsistent or in accord with our decision.

ADMINISTRATIVE PROCEEDING
FILE NO. 3-1512

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
June 19, 1970

In the Matters of

BABCOCK & CO. 136 South Main Street Salt Lake City, Utah (8-11902) LOUIS W. BABCOCK ROBERT T. STEAD Securities Exchange Act of 1934 -- Sections 15(b) and 15A	ORDER REVOKING BROKER-DEALER REGISTRATION, EXPELLING FROM REGISTERED SECURITIES ASSOCIATION AND BARRING ASSOCIATED PERSONS

Proceedings having been instituted pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 to determine what, if any, remedial action is appropriate in the public interest with respect to Babcock & Co., Louis W. Babcock and Robert T. Stead;

Hearings having been held after appropriate notice, the hearing examiner having filed an initial decision, the Commission having granted respondents' petitions for review, briefs having been filed, and oral argument having been heard;

The Commission having this date issued its Findings and Opinion; on the basis of said Findings and Opinion

IT IS ORDERED that the registration as a broker and dealer of Babcock & Co. be, and it hereby is, revoked; that Babcock & Co. be, and it hereby is, expelled from membership in the National Association of Securities Dealers Inc., and that Louis W. Babcock and Robert T. Stead be, and they hereby are, barred from being associated with any broker or dealer except that Babcock after six months and Stead after three months may

become associated with a broker-dealer in a supervised capacity upon an appropriate showing that they will be adequately supervised.

By the Commission.

/s/ Orval L. DuBois
Secretary

ADMINISTRATIVE PROCEEDING
FILE NO. 3-1512

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
July 14, 1970

In the Matter of

ROBERT T. STEAD
136 South Main Street
Salt Lake City, Utah

Securities Exchange Act of 1934 –
Section 15(b)

MEMORANDUM OPINION AND ORDER DENYING PETITION FOR REHEARING AND GRANTING STAY

Robert T. Stead has filed a petition for rehearing with respect to our Findings, Opinion and Order of June 19, 1970 (Securities Exchange Act Release No. 8905) which, among other things, barred him from being associated with any broker or dealer; with the proviso that after three months he may become so associated in a supervised capacity upon an appropriate showing that he will be adequately supervised.

Petitioner asserts that the sanctions imposed are unduly harsh and are penalties, and that a showing of adequate supervision should not be required for his association with a broker-dealer. He again stresses that he is the owner and operator of a broker-dealer firm in Salt Lake City which employs over 20 persons, and argues that the bar order in question will operate to remove that firm from the securities business. He asserts that he was voluntarily instituted a sound system of control in his firm and since the institution of the proceedings has demonstrated his willingness and ability to operate it in conformance with applicable requirements. He asserts that neither he nor his firm have been named by the Commission in any proceeding involving activities alleged to have occurred after the formation of his firm in November 1968.

In determining that it was appropriate to impose the sanctions in question, we took into account the nature and extent of petitioner's misconduct and the mitigative factors involved.

We fully considered and evaluated the statements previously made by petitioner that he had been in the securities business for 15 years without any other complaint, and that a bar order of the kind entered would close his firm. We considered that the serious misconduct found, which involved violations of the registration provisions of the Securities Act of 1933 and the record-keeping requirements of the Securities Exchange Act of 1934, demonstrated an insensitivity to the standards required of those engaged in the securities business and required that he be disqualified for an indefinite period from engaging in such business in a supervisory capacity. That his firm may now be operating in compliance with applicable requirements is not sufficient to overcome the gravity of the violations we have found and warrant relieving him of such disqualification. Moreover, as we previously noted in rejecting the assertion that he was not the subject of any other complaint, petitioner was named as a respondent in broker-dealer proceedings instituted in April 1969. Those proceedings charge willful violation of the registration provisions of the Securities Act from January to August 1968.

The sanctions imposed against the petitioner are remedial, not penal, in nature and are designed to protect investors and the public interest by deterring him as well as others in the industry from committing violations of the securities laws. As we previously noted, the requirement of supervised association in any future employment will not necessarily be permanent.

In view of the foregoing, we have determined to deny the petition for rehearing and the request by petitioner for oral argument on the petition. We have considered petitioner's request that in the event the petition is denied the effectiveness of our bar order be stayed pending Court review of such order, and have determined to grant an appropriate stay.

Accordingly, IT IS ORDERED that the petition of Robert T. Stead for rehearing and his request for oral argument on such petition be, and they hereby are, denied.

IT IS FURTHER ORDERED that the effectiveness of the bar order heretofore entered by the Commission against Stead be, and it hereby is, stayed for a period of 10 days from the date of this order, and in the event that a petition for Court review of such bar order shall be filed pursuant to Section 25 of the

Securities Exchange Act of 1934 within that period, said order is further stayed pending action by the Court upon such petition.

By the Commission.

/s/ Orval L. DuBois
Secretary

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 382-70 – MAY 1971 TERM
JULY 2, 1971

ROBERT T. STEAD,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

Petition for Review From The United States Securities and Exchange Commission.

Before SETH and HOLLOWAY, Circuit Judges, and DOYLE, District Judge.

SETH, Circuit Judge.

Robert T. Stead has petitioned this court, pursuant to section 25(a) of the Securities Exchange Act of 1934, to review an order of the Securities and Exchange Commission. The commission's order barred Stead from association with any broker or dealer, with the proviso that he could become employed in a supervised capacity after three months upon a showing that he would be adequately supervised. A memorandum opinion and order denying the petition of Stead for rehearing but granting Stead's request for a stay pending judicial review was entered.

In its findings and opinion, the commission found that Stead willfully violated the registration provisions of sections 5(a) and (c) of the Securities Act of 1933 in the offer, sale, and delivery

of the common stock of Triumph Corporation for which no registration statement had been filed; in willfully aiding and abetting violations by Babcock & Co. of the antifraud provisions of section 15(c)(1) of the Securities Exchange Act of 1934 which require a broker-dealer participating in a distribution of securities to give customers who purchase such securities from it written notification of the existence of its participation in the distribution; and in willfully aiding and abetting violations by the firm of the recordkeeping provisions of section 17(a) of the Securities Exchange Act of 1934.

When Stead was first employed at the Salt Lake City office of Babcock & Co. in April 1967 he opened an account for "R & E Investment," which replaced an account for "Triumph Corporation," in the Ogden office. Prior to his employment with Babcock, Stead had spent some sixteen years in the brokerage business and had dealt with an R & E account at another firm. He had opened the R & E account at this prior firm at the request of Hugo Emery, president of Triumph Corporation. The stock in the R & E accounts was thus in fact being distributed by an issuer, and since no registration statement was in effect its distribution was potentially in violation of the Securities Act of 1933.

In his defense, Stead argued that he made a reasonable effort to ascertain the status of this stock before handling it. Apparently he contacted Triumph Corporation's transfer agent and was told that the stock was "freely tradable." However, in examining all of the contacts Stead had with R & E account, and with Hugo Emery, while with the prior firm and with Babcock, the commission concluded that Stead should have made a more thorough investigation before trading the Triumph stock through the R & E account.

The commission found that Babcock & Co. violated the antifraud provisions of section 15(c)(1) of the Securities Exchange Act of 1934 and Rule 15c1-6 thereunder by failing to give purchasers of Triumph stock from it a written notification of the existence of the firm's participation in the Triumph distribution and that Stead willfully aided and abetted these violations.

The commission also found that Stead willfully aided and

abetted violations by Babcock & Co. of the recordkeeping provisions of the Securities Exchange Act of 1934. These violations occurred when the firm failed to record on Stead's account the receipt of securities delivered by Stead to the firm commencing on April 19, 1967. They also found they occurred when the firm carried a dollar balance in Stead's account as of May 31, 1967, at $22,937.00 when the true amount was $46,812.00. Finding that Stead knew or should have known these errors, the commission concluded that he aided and abetted the violations because " . . . they involved deficiencies in his individual trading account with respect to matters that were subject to his control."

On this appeal Stead attacks the sufficiency of the evidence to support the commission's findings and urges that the imposed sanction is too severe.

As to the violation of registration provisions, Stead urges that he did make reasonable inquiry into the nature of the R & E account and the status of the Triumph stock and that he reasonably believed the transactions involving Triumph corporation stock in the R & E account were exempt from the registration requirements of the Securities Act of 1933.

The records shows that the Triumph Corporation stock was being traded through an account at Babcock & Co. controlled by the president of Triumph Corporation. This was the "R & E" account. The record also shows that this was the only stock being traded in that account, and Stead testified that he was "suspicious" of Triumph's president. There was no registration statement filed for this stock. Stead had prior dealings with this stock in a similar account while working for another broker and had prior contacts with the corporation's president. From these circumstances the commission's finding that Stead knew or should have known that there was no registration is well supported by evidence. The act of Stead in calling the transfer agent is obviously not a sufficient inquiry. There is ample evidence to support the finding of the commission on these questions and there is little doubt that Stead could have very easily discovered that the Triumph distribution involved the issues and was therefore not exempt under section 4(1) of the Securities Act of 1933 from the registration requirements of sections 5(1) and (c) of that Act.

As to his duty, see Hanly v. Securities & Exchange Comm'n, 415 F.2d 589 (2d Cir.); Berko v. Securities & Exchange Comm'n, 316 F.2d 137 (2d Cir.), and Rule 154 of the commission.

In his brief Stead argues that the transactions relative to the Triumph stock were exempt from the registration requirements because they were either dealer's transactions under section 4(3) or unsolicited broker's transactions under section 4(4). The question of the applicability of these two exemptions was not raised before the commission when it reviewed the initial findings of the Examiner. Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(1), which confers jurisdiction upon courts of appeals to review commission orders entered under the Exchange Act specifically provides that "no objection to the order to the Commission shall be considered by the court unless such objection shall have been urged before the Commission." See, Gilligan, Will & Co. v. Securities & Exchange Comm'n, 267 F.2d 461 (2d Cir.); Lile v. Securities & Exchange Comm'n, 324 F.2d 772 (9th Cir.). Accordingly, the question of these exemptions is not properly before this court and will not be considered on this appeal.

There is ample evidence to support the findings of the commission in connection with the recordkeeping violation. When Stead joined the Babcock firm, he delivered his own securities to the company for purposes of future sale. These securities were not entered in Stead's account until after their sale, and he was aware of that situation. In some instances of sale, however, no entry was made to reflect receipt of a security, sale of which was recorded thereby giving the misleading appearance of a short sale. A reconstructed account showed substantial differences in dollar balances and securities received in Stead's account from time to time. The fact that Stead did not exercise control over the books of the firm does not excuse him from watching over and preventing irregularities in his own account. He did receive requests from the auditors for confirmation of stated balances. The commission's finding that Stead aided and abetted a violation of the recordkeeping provisions of section 17(a) of the Securities Exchange Act of 1934 is supported by substantial evidence. As to the "willful" aspect of the recordkeeping violation it was sufficient to show Stead knew that the securi-

ties initially deposited were not recorded, and as to the dollar balances the receipt of requests for confirmation with a failure to inquire was also sufficient. See, Tager v. Securities & Exchange Comm'n, 344 F.2d 5 (2d Cir.).

Finally, Stead argues that the sanctions imposed by the commission constitute a penalty rather than a remedy in the public interest as required by the Securities Exchange Act. The commission barred Stead from being associated with any broker or dealer for three months. After that time he can be so associated but only in a supervised capacity and upon an appropriate showing that he will be adequately supervised. Stead contends that the effect of this sanction is to put him out of the securities business, especially since he now is managing his own brokerage firm which he opened after the instant proceedings had begun. While we appreciate the impact of the sanction imposed by the commission, we are also mindful of the fact that the commission and not the court has been assigned primary responsibility by Congress for the protection of investors in securities. In Associated Securities Corp. v. Securities & Exchange Comm'n, 293 F.2d 738 (10th Cir.), we consider the standards for review as to the facts and we noted as to sanctions:

> "The balancing of private detriment against public harm requires the fair and proper exercise by the Commission of its discretionary powers. . . .[A]nd the exercise by the Commission of its discretionary powers will not be upset by the courts except for cogent reasons."

We do not find, as Stead urges, that his management of a brokerage firm, opened while the proceedings were pending, or any other factor present, justifies this court in upsetting the sanction portion of the commission's order.

AFFIRMED.

Certificate of Service

I hereby certify that on this 9th day of November, 1971, three copies of the Petition for a Writ of Certiiorari were mailed, airmail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530 and to Office of the General Counsel, Securities and Exchange Commission, 500 North Capitol Street, Washington, D. C. 20570. I further certify that all parties required to be served have been served.

/s/ Arthur F. Mathews
ARTHUR F. MATHEWS
900 Seventeenth Street, N. W.
Washington, D. C. 20006

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
DEC 8 1971
E. ROBERT SEAVER, CLERK

No. 71-635

In the Supreme Court of the United States

OCTOBER TERM, 1971

ROBERT T. STEAD, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

G. BRADFORD COOK,
General Counsel,
Securities and Exchange Commission,
Washington, D. C. 20549.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-635

ROBERT T. STEAD, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

On the basis of findings that petitioner willfully violated the federal securities laws while he was a securities salesman and trader for a broker-dealer firm, the Securities and Exchange Commission entered an order barring petitioner from being associated with any broker or dealer, except that he could become associated with a broker or dealer after three months upon a showing that he would be adequately supervised (Pet. App. A1-14). The court of appeals affirmed (Pet. App. A18-22).

Petitioner's only contention is that the Commission improperly relied upon unproved allegations made against him in another proceeding as a basis for imposing the sanction in the instant proceeding without affording him an opportunity to rebut those allegations.

Contrary to petitioner's contention, the Commission did not base the sanction imposed upon petitioner upon allegations made in another proceeding. Although the Commission did refer in its opinion in the present case to another proceeding instituted against petitioner, it did so only in response to an argument made by petitioner. In a brief filed in June 1969 with the Commission in the present case, petitioner claimed that he had "been engaged in the brokerage business for fifteen years without complaint, censure or sanction."[1] In its opinion, the Commission simply observed that a complaint had been made against him, since the Commission had instituted another broker-dealer proceeding against petitioner in April 1969 charging him with federal securities law violations (Pet. App. A10-12).[2]

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[1] See page 71 of the joint appendix filed in the court of appeals.

[2] In seeking rehearing before the Commission, petitioner asserted that neither he nor the new broker-dealer firm with which he was then connected had been named by the Commission in any proceeding involving activities alleged to have occurred after the formation of his firm in November 1968. In commenting upon this assertion in its opinion and order denying rehearing, the Commission noted that the April 1969 proceeding referred to above charged willful violation of the registration provisions of the Securities Act from January to August 1968 (Pet. App. A15-16).

Since the Commission referred to the other proceeding only to show that a proceeding against petitioner had been instituted, the truthfulness of the allegations made in the other proceeding was not in issue in the present case; accordingly, there is no merit to petitioner's contention that he should have been given an opportunity to rebut those allegations.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

G. BRADFORD COOK,
General Counsel,
Securities and Exchange Commission.

DECEMBER 1971.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-635

ROBERT T. STEAD, Petitioner
v.
SECURITIES AND EXCHANGE COMMISSION, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY OF PETITIONER STEAD

ARTHUR F. MATHEWS
900 Seventeenth St., N.W.
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NORMAN S. JOHNSON
Gardiner & Johnson
1320 Continental Bank Bldg.
Salt Lake City, Utah 84101

December ~~15~~ 20, 1971

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-635

ROBERT T. STEAD, Petitioner
v.
SECURITIES AND EXCHANGE COMMISSION,
Respondent

REPLY OF PETITIONER STEAD

Contrary to the assertions of the Memorandum for the Securities and Exchange Commission, it is apparent from the opinions below that the Commission did impose sanctions on Petitioner Stead in reliance upon the truthfulness of the allegations in other proceedings in which no adjudicatory determination regarding the truth or falsity of the allegations had been made.

The discussions in the Commission's opinions of the unrelated proceedings were not mere observations; they were set forth as evidence of repeated violations of the securities laws as a reason for sanctioning Stead in the manner proposed. (A. 12; A. 16) At the time the instant proceeding was initiated no complaint had been made against him,[1] yet the Commission subsequently issued a complaint and then relied upon that very complaint as evidence of the need for the sanctions imposed. The

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[1]The complaint in the unrelated proceeding was issued in April, 1969, which was subsequent to the hearing in the instant matter which was held before the Commission's hearing examiner on May 21 to 27, 1968. (Pet. App. 3)

truthfulness of the allegations in the other proceeding were not placed in issue – they were cavalierly assumed to be true.

For the foregoing reasons it is respectfully submitted that a Writ of Certiorari should be granted.

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Certificate of Service

I hereby certify that on this 20th ~~15th~~ day of December, 1971, three copies of the Reply of Petitioner Stead were mailed, ~~air mail~~ postage prepaid, to the Soliciter General, Department of Justice, Washington, D.C. 20530 and to the Office of the General Counsel, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20570. I further certify that all parties required to be served have been served.

/s/ Arthur F. Mathews
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